

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DIAMOND RIVERS,)	8:09CV267
)	
Plaintiff,)	
)	
v.)	MEMORANDUM
)	AND ORDER
RANDI PERRY,)	
)	
Defendant.)	

Plaintiff filed his Complaint in this matter on August 6, 2009. (Filing No. [1](#).) Plaintiff has previously been given leave to proceed in forma pauperis. (Filing No. [5](#).) The court now conducts an initial review of the Complaint to determine whether summary dismissal is appropriate under [28 U.S.C. § 1915\(e\)\(2\)](#).

I. SUMMARY OF COMPLAINT

_____Plaintiff filed his Complaint on August 6, 2009, against Randi Perry. (Filing No. [1](#) at CM/ECF p. 1.) Both Plaintiff and Defendant reside in Omaha, Nebraska. (*Id.*)

Condensed and summarized, Plaintiff alleges that Defendant made “false allegations” about him that caused the Nebraska Department of Health and Human Services to “make wrongful decisions.” (*Id.* at CM/ECF p. 4.) Plaintiff asks the court release his daughter to him and prosecute “Perry for federal bigami [sic].” (*Id.* at CM/ECF p. 5.)

II. APPLICABLE LEGAL STANDARDS ON INITIAL REVIEW

The court is required to review in forma pauperis complaints to determine whether summary dismissal is appropriate. *See* [28 U.S.C. § 1915\(e\)\(2\)](#). The court must dismiss a complaint or any portion thereof that states a frivolous or malicious claim, that fails to state a claim upon which relief may be granted, or that seeks monetary relief from a defendant who is immune from such relief. [28 U.S.C. § 1915\(e\)\(2\)\(B\)](#).

Therefore, where a pro se plaintiff does not set forth enough factual allegations to “nudge[] their claims across the line from conceivable to plausible, their complaint must be dismissed” for failing to state a claim upon which relief can be granted. [Bell Atlantic Corp. v. Twombly](#), 127 S. Ct. 1955, 1974 (2007) (overruling [Conley v. Gibson](#), 355 U.S. 41 (1967)), and setting new standard for failure to state a claim upon which relief may be granted). Regardless of whether a plaintiff is represented or is appearing pro se, the plaintiff’s complaint must allege specific facts sufficient to state a claim. *See* [Martin v. Sargent](#), 780 F.2d 1334, 1337 (8th Cir. 1985). However, a pro se plaintiff’s allegations must be construed liberally. [Burke v. North Dakota Dep’t of Corr. & Rehab.](#), 294 F.3d 1043, 1043-44 (8th Cir. 2002) (citations omitted).

III. DISCUSSION OF CLAIMS

1. Plaintiff’s Request to Prosecute Defendant

A private plaintiff cannot force a criminal prosecution because the “authority to initiate a criminal complaint rests exclusively with state and federal prosecutors.” *See* [Collyer v. Darling](#), 98 F.3d 211, 222 (6th Cir. 1996); *see also* [United States v. Batchelder](#), 442 U.S. 114, 124 (1979) (“Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor’s discretion.”); [Rzayeva v. United States](#), 492 F.Supp. 2d 60, 73 (D. Conn. 2007)

(“[T]his Court lacks jurisdiction to order federal agents to initiate a prosecution.”). In light of these findings, Plaintiff’s request to prosecute Defendant for “federal bigami [sic]” must be dismissed. (Filing No. 1 at CM/ECF p. 5.)

2. Subject Matter Jurisdiction

As set forth by the Federal Rules of Civil Procedure, “[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” [Fed. R. Civ. Pro. 12\(h\)\(3\)](#). Subject matter jurisdiction is proper pursuant to [28 U.S.C. § 1332](#), commonly referred to as “diversity of citizenship” jurisdiction. For purposes of [28 U.S.C. § 1332](#), “diversity of citizenship” means that “the citizenship of each plaintiff is different from the citizenship of each defendant.” [Ryan v. Schneider Nat’l Carriers, Inc.](#), 263 F.3d 816, 819 (8th Cir. 2001) (citation omitted). In addition, the amount in controversy must be greater than \$75,000.00 for diversity of citizenship jurisdiction. [28 U.S.C. § 1332\(a\)](#).

Here, Plaintiff has failed to specify an amount in controversy. In addition, the Complaint clearly indicates that Plaintiff and Defendant are citizens of the same state. (Filing No. 1 at CM/ECF p. 1.) Accordingly, diversity of citizenship jurisdiction cannot be a basis for jurisdiction in this matter.

However, subject matter jurisdiction is also proper where a plaintiff asserts “[a] non-frivolous claim of a right or remedy under a federal statute,” commonly referred to as “federal question” jurisdiction. [Northwest South Dakota Prod. Credit Ass’n v. Smith](#), 784 F.2d 323, 325 (8th Cir. 1986). Affording the Complaint the most liberal construction, Plaintiff fails to allege that Defendant violated his civil rights. Further, even if Plaintiff had alleged a claim under [42 U.S.C. § 1983](#), he has not alleged that a person acting under color of state law caused the violation. [West v. Atkins](#), 487 U.S. 42, 48 (1988); [Buckley v. Barlow](#), 997 F.2d 494, 495 (8th Cir. 1993); see also [Pino v. Higgs](#), 75 F.3d 1461, 1464-67 (10th Cir. 1996) (“To bring a claim under § 1983,

a plaintiff must initially establish that a defendant acted ‘under color of any statute, ordinance, regulation, custom, or usage, of any State’ to deprive the plaintiff of ‘any rights, privileges, or immunities secured by the Constitution and laws’ of the United States. [42 U.S.C. § 1983](#).”) (citations omitted). Therefore, if a defendant’s actions were “not state action, our inquiry ends.” [Rendell-Baker, 457 U.S. at 838](#).

In sum, the court lacks subject matter jurisdiction over Plaintiff’s claims and the Complaint must be dismissed. However, because Plaintiff may have state-law claims for slander, the court will dismiss Plaintiff’s Complaint without prejudice to reassertion in the proper forum.

IT IS THEREFORE ORDERED that:

1. Plaintiff’s Complaint (filing no. [1](#)) is dismissed without prejudice to reassertion in the proper forum.

2. A separate Judgment will be entered in accordance with this Memorandum and Order.

September 23, 2009.

BY THE COURT:

Richard G. Kopf
United States District Judge

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